Vulcan Golf, LLC v. Google Inc. et al Doc. 209

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VULCAN GOLF, LLC, JOHN B. SANFILIPPPO & SONS, INC., BLITZ REALTY GROUP, INC., and VINCENTE E. "BO" JACKSON, Individually And On Behalf Of All Others Similarly Situated,	) Case No. 07 CV 3371
Lead Plaintiffs,	) The Honorable Blanche M. Manning
v.	) Magistrate Judge Geraldine Soat Brown
GOOGLE INC., OVERSEE.NET, SEDO LLC, DOTSTER, INC., AKA REVENUEDIRECT.COM INTERNET REIT, INC. d/b/a/ IREIT, INC.; and JOHN DOES I-X,	)
Defendants.	)

DECLARATION OF JOSEPH C. GRATZ IN SUPPORT OF DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I, Joseph C. Gratz, declare as follows:

1. I am an attorney licensed to practice law in the state of California and am an associate with the law firm of Keker & Van Nest LLP, counsel for defendant Google Inc. in the above-captioned action. I have knowledge of the facts set forth herein and, if called to testify as a witness thereto, could do so competently under oath.

2. This declaration summarizes the key communications between the parties regarding plaintiffs' motion for preliminary injunction.

3. On January 3, 2008, Plaintiffs filed a Motion for Preliminary Injunction. Docket Item ("D.I.") 122. On January 25, 2008, Plaintiffs filed a "Motion to Supplement" its Motion for Preliminary Injunction. D.I. 127. On February 5, 2008, the Court sua sponte struck the Motions as premature. D.I. 132.

4. On April 9, 2008, Plaintiffs filed a "Motion for Leave to Refile" its Motion for Preliminary Injunction. D.I. 152. Defendants filed a consolidated response, D.I. 156, and Plaintiffs filed a reply, D.I. 161. On May 5, 2008, the Court granted leave to file the Motion for Preliminary Injunction with respect to the named plaintiffs only. In its order, the Court stated that "in light of the defendants' assertion that injunctive relief is unnecessary given that they have voluntarily blocked all of the purportedly offending domain names," the parties were directed to meet and confer and "make every effort possible to resolve the issues presented in the motion for injunctive relief." D.I. 167. Google had asserted in its briefs in support of its motions to dismiss that its trademark complaint policy, pursuant to which Google had blocked the purportedly offending domain names, obviated the need for injunctive relief. Attached hereto as Exhibit A is a true and correct copy of a web page on the Google web site describing that policy titled "AdSense for Domains Trademark Complaint Procedure," *at* http://www.google.com/tm_complaint_afd.html.

5. On May 7, 2008, Plaintiffs again filed their Motion for Preliminary Injunction. D.I. 168.

6. On May 7, 2008, Plaintiffs' counsel Robert M. Foote sent a letter, attached hereto as Exhibit B, to counsel for Defendants. In that letter, Mr. Foote proposed a number of

categorical rules similar to those which appear on pages 14-16 of plaintiffs' brief in support of their motion for class certification.

7. On May 13, 2008, I sent a letter, attached hereto as Exhibit C, to counsel for Plaintiffs. In that letter, I explained why Google's complaint policies eliminated the need for an injunction, and why plaintiffs' proposal to filter domains was unnecessary and unworkable.

8. In May, June, July, and August of 2008, I exchanged correspondence with and conferred with plaintiffs' counsel several times. In that correspondence and during those conferences, plaintiffs' counsel proposed categorical rules similar to those which appear on pages 14-16 of plaintiffs' brief. I responded by reiterating Google's willingness to place on its "fail list" any domain about which plaintiffs had legitimate complaint and requesting a list of all such domains. On several occasions, plaintiffs' counsel listed additional domains to which they objected. Google has placed on its "fail list" every domain that plaintiffs have listed as infringing their trademarks throughout this litigation.

9. On August 23, 2008, Plaintiffs' counsel Mark A. Bulgarelli sent an email, attached hereto as Exhibit D, to counsel for defendants. In that letter, Mr. Bulgarelli offered to withdraw plaintiffs' motion for preliminary injunction. The letter read, in part:

> In regards to Plaintiffs' email of August 9, 2008, we have received responses to the aforementioned email from the majority of Defendants, in which those Defendants have agreed to block all domain names identified within that correspondence, and to furthermore block and/or continue to block all domain names previously identified within Plaintiffs' pleadings, motions, briefs, and correspondences. Please see the attached list of all domain names to be blocked by Defendants.
>
> If all Defendants agree to the terms stated above, Plaintiffs shall deem this satisfactory to alleviate, at this time, the issues and concerns raised by Plaintiffs in their Motion for Preliminary Injunction. As a result, upon Defendants agreement to abide by the aforementioned terms, Plaintiffs will withdraw their Motion for Preliminary Injunction.

10. On August 25, 2008, Plaintiffs withdrew their motion for preliminary injunction. D.I. 201.

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I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct to the best of my knowledge. Executed September 11, 2008, at San Francisco, California.

JOSEPH C. GRATZ